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STATUS OF PREPARATION OF PUBLICATIONS, STUDIES AND DOCUMENTS FOR THE WORLD CONFERENCE

Note by the Secretariat

Addendum

Contribution from the International Commission of Jurists

The attention of the Preparatory Committee is drawn to the attached contribution prepared by the International Commission of Jurists, a non-governmental organization in consultative status with the Economic and Social Council (category II), entitled "the Establishment of a Permanent International Penal Court".

INTERNATIONAL COMMISSION OF JURISTS

COMMISSION INTERNATIONALE DE JURISTES

COMISIÓN INTERNACIONAL DE JURISTAS

POSITION PAPER:

THE ESTABLISHMENT OF A PERMANENT INTERNATIONAL PENAL COURT

May 1993

THE ESTABLISHMENT OF A PERMANENT INTERNATIONAL PENAL COURT

The gross violations of human rights and humanitarian law committed in the former Yugoslavia have brought to the public consciousness a point long maintained by international jurists: perpetrators of such crimes must be brought to justice.

Highlighting the absence of an international judicial mechanism to enforce human rights and humanitarian law, various expert bodies, including the International Commission of Jurists (ICJ), have been urging for the establishment of a permanent International Penal Court[1] to try cases of gross violations of human rights and humanitarian law. For decades, several bodies, including the United Nations International Law Commission, have been engaged in studying the feasibility of this idea. No practical steps, however, have been taken in this direction.

As the international community is moving from the phase of standard-setting in the human rights field to the phase of implementation, the ICJ believes that the establishment of a permanent International Penal Court is timely and essential. In the Decade of International Law, this Court should be made a reality.

The crisis in the former Yugoslavia has revived international interest in this matter. Responding to universal calls to try those responsible for serious violations of international law committed in this territory, the U.N. Security Council adopted Resolution 808 that decided to create an *ad hoc* tribunal.

The *ad hoc* tribunal approach to international criminal jurisdiction versus the permanent court approach has become the subject of further debates. The ICJ takes the stand that while the *ad hoc* approach could be appropriate to respond to the crisis in the former Yugoslavia, it fails to

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[1]The adjective "Penal", used throughout this paper, is interchangeable with "Criminal".

address the global need for an international judicial mechanism to try cases of gross violations of human rights and humanitarian law wherever and whenever they occur. As stated in the International Meeting Concerning Impunity in November 1992,[2] we believe that it is possible to build on the work of the *ad hoc* tribunal as a step towards establishing a permanent International Penal Court. The work on these two fronts should be carried out in parallel.

This position paper seeks to outline issues surrounding the establishment of the permanent International Penal Court. Part One of this paper briefly discusses the history of developments towards an International Penal Court, including the recent work of the International Law Commission. Part Two addresses the question of why a permanent International Penal Court is needed, and it responds to the most common arguments against the establishment of such a Court. In Part Three, a possible blueprint of the International Penal Court is outlined, raising alternatives and questions concerning the structure and procedure of the Court. Part Four concludes with the ICJ's final recommendations.

I. BACKGROUND

A. History

The idea of a court with international criminal jurisdiction is not a new concept.[3] Contemporary efforts to establish such a court started after World War I. Articles 227-29 of the Treaty of Versailles provided for an international court to prosecute war criminals, including Kaiser Wilhelm II. The Kaiser, however, fled to the Netherlands where he obtained refuge, and the Allies abandoned the idea of an international court.

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[2] Organized by the ICJ and the French National Human Rights Consultative Commission, Geneva, November, 1992.

[3] See M. Cherif Bassiouni, International Criminal Law: A Draft International Criminal Code (1980); I International Criminal Law 587 (M. Cherif Bassiouni & Ved P. Nanda eds.) (1973).

The Allies of the First World War also failed to prosecute those responsible for the killing of an estimated 600,000 Armenians in Turkey. The 1919 Commission on the Responsibilities of the Authors of the War and on the Enforcement of Penalties for Violations of the Laws and Customs of War recommended the prosecution of responsible Turkish officials, and in doing so, highlighted the concept of "crimes against humanity". The United States, however, opposed prosecution on the technical legal argument that no such crimes existed under positive international law. Consequently, the Treaty of Sévres (1920), which was to serve as a basis for the prosecution of those responsible, was never ratified, and its replacement, the Treaty of Lausanne (1923), gave the Turkish officials amnesty.

After World War II, the Allies established two international tribunals, at Nuremberg and Tokyo, to try major war criminals. Subsequent to the Nuremberg and Tokyo trials, the Allies established war crime tribunals in their respective zones of occupation in Germany and tried over 20,000 war criminals. Germany then took over the task of prosecuting offenders found in its territory. Formerly-occupied countries of Europe prosecuted Nazis and nationals who had collaborated with them.

In 1948, the Convention on the Prevention and Punishment of the Crime of Genocide, codified the jurisdiction of an international criminal court for the first time. The Convention prescribes that "[p]ersons charged with genocide, shall be tried by a competent tribunal of the state in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those contracting parties, which shall have accepted its jurisdiction."[4]

As a result of the post-World War II prosecutions, the United Nations established a Committee to codify "Offences Against the Peace and Security of Mankind". In 1951, the Code was prepared, and in 1953, it was amended. Between

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[4]Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948).

1950 and 1952, two Committees on international criminal jurisdiction prepared a draft statute for the International Penal Court. The General Assembly, however, took no steps concerning these developments.

Subsequently, in 1973, the International Convention on the Suppression and Punishment of the Crime of Apartheid provided that persons charged with apartheid acts "may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those State Parties which shall have accepted its jurisdiction."[5] In 1980, a Draft Statute for an International Penal Tribunal to prosecute apartheid violators was elaborated, but the project has not been acted upon.

More recently, the United Nations and its members have responded to the crisis in the former Yugoslavia by deciding to create an *ad hoc* international tribunal. The Special Rapporteur of the U.N. Commission on Human Rights entrusted to investigate violations of human rights in these territories recognized "[t]he need to prosecute those responsible for mass and flagrant human rights violations and for breaches of international humanitarian law and to deter future violators...."[6] In this regard, Security Council Resolution 780 created an impartial panel of experts to investigate the violations of the Geneva Conventions and all other violations of international humanitarian law committed in the former Yugoslavia.[7] Security Council Resolution 808 further decided to create an *ad hoc* international tribunal with the power to prosecute those persons responsible for "serious violations of international

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[5]International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, 28 GAOR (No.50), U.N. Doc. A/9233/Add. 1 (1973).

[6]Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, E/CN.4/1992/S-1/9, at para. 69.

[7]S/RES/780 (1992).

humanitarian law committed in the territory of the former Yugoslavia since 1991".[8]

B. Recent Work of the U.N. International Law Commission

In 1981, the General Assembly invited the International Law Commission (ILC) to resume its work to elaborate the draft Code of Crimes against the Peace and Security of Mankind (draft Code). Ten years later, the General Assembly specifically requested the ILC to prepare a report on the possibility of an international criminal court within the context of the draft Code. In 1990, ILC-member Professor Stephan C. McCaffrey stated that there was "broad agreement, in principle, on the desirability of establishing a permanent international criminal court within the United Nations system.... The international climate now appears particularly favourable for the establishment of such a court ... and it would be unfortunate if the opportunity were lost."[9] The ILC's 1991 Report offered some provisional formulations and an extended commentary on two issues: 1) the court's jurisdiction; and 2) the requirements for instituting criminal proceedings.[10]

In 1992, ILC Special Rapporteur for the draft Code, Mr. Doudou Thiam, devoted his Tenth Report entirely to the question of international criminal jurisdiction, which led to a debate on the issue during the ILC's 1992 session.[11] The Commission established a Working Group on the question of an international criminal jurisdiction, chaired by Mr. Abdul Koroma. The Report of the Working Group, included as an Annex to the ILC's 1992 Report, concluded that such a court was indeed possible and it set forth concrete

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[8]S/RES/808 (1993), at para. 1.

[9]Benard B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 Colum. J. Transnat'l L. 375, 385 (1992), quoting Stephan C McCaffrey, *The Forty-Second Session of the International Law Commission*, 84 Am. J. Int'l L. 930, 933 (1990).

[10]See Report of the International Law Commission on the Work of its Forty-Third Session, U.N. GAOR, 46th Sess., Supp. No. 10 U.N. Doc. A/46/10 (1991) [hereinafter 1991 ILC Report].

[11]Special Rapporteur on the draft Code of Crimes of Crimes Against the Peace and Security of Mankind, Tenth Report, A/CN.4/442, para. 47.

recommendations.[12] In his Eleventh Report, dated 25 March 1993, Mr. Thiam formalized the work of the Working Group and proposed a draft Statute of an International Penal Court.[13] This draft Statute will be considered by the Forty-Fourth session of the ILC, which takes place in Geneva, 3 May-23 July 1993.

II. THE NEED FOR A PERMANENT INTERNATIONAL PENAL COURT

A. Why a judicial mechanism?

While the U.N. system on human rights has developed immensely since its establishment, the implementation of standards, however well-established, has been notoriously unsuccessful. As an increasing number of U.N. Working Groups and Special Rapporteurs catalogue the steady deterioration of human rights situations around the globe, abuses such as torture, summary or arbitrary executions, and disappearances continue unabated. The lack of adequate international machinery to protect individuals from gross violations of human rights is the alarming and disturbing reality. Now, more than any other time in the past, the international community appears to be ready to proceed in taking practical steps towards the creation of a permanent International Penal Court.

The relevant law exists. A body of international treaties, culminating with the draft Code of Crimes Against the Peace and Security of Mankind,[14] prohibits, *inter alia*, systematic or gross violations of human rights (including torture, disappearances, and extrajudicial executions), crimes against humanity, war crimes, and various other crimes of an international nature. What is conspicuously absent is a method of enforcement to give these laws

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[12]Report of the Working Group on the question of an international criminal jurisdiction, Report of the International Law Commission on the Work of its Forty-Fourth Session, A/47/10 (1992) [hereinafter Report of the ILC Working Group].

[13]A/CN.4/449.

[14]1991 ILC Report, supra note 10.

significance in the real world and to punish offenders of these norms. The burden is now to show how an International Penal Court would satisfy this need.

One of the purposes of any penal system is to ensure that perpetrators are justly made responsible for the crimes they commit. The same is true under international law: as it was recognized in Principle I of the Charter of the Nuremberg Tribunal, "[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment."[15]

Today, many of those who violate human rights law are not made accountable for their acts. Grave violations of human rights are committed with impunity the world over. This impunity lessens and even eliminates the legal effect of the norms which define conduct as criminal. Impunity undermines the principle of equality before the law by freeing certain persons from all responsibility. As correctly stated by the ILC Working Group,

> "the case for some international jurisdictional mechanism starts from the fact that there have been since 1945 notorious cases of crimes against humanity that have gone unpunished. It has proved extremely difficult to bring such offenders to justice, and the lack of any alternative forum at the international level has exacerbated these difficulties. One reason for the difficulty is that, in many cases, serious crimes against peace or humanity have been committed by persons who were at the time members of the Government of a State. It discredits the norms of international law if they are never enforced."[16]

However, the seriousness of accusing an individual or group of committing gross violations of human rights or humanitarian law requires a cautious approach. No one should be unjustly labelled with such charges. The existence of an international court that fairly examines and verifies these accusations will ensure that they are handled with impartiality and objectivity.

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[15]Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.

[16]Report of the ILC Working Group, supra note 12, at para. 419.

There is also the problem of politicization. Various parties or non-parties to a conflict accuse others of committing crimes against international law to serve their own political ends. Moreover, experience demonstrates that taking action against the perpetrators of such crimes at the international level is also surrounded by political considerations. Creating a court rather than an international political office to deal with such issues should, therefore, minimize the politicization of these matters. An impartial and independent court will undoubtedly enhance international cooperation in the respect for international human rights law.

The just implementation of individual punishment will deter others from committing similar crimes. Crime becomes less attractive to potential offenders when punishment will result from their actions as a matter of course. It is equally important to compensate victims of violations of human rights. If international law, painstakingly established over the last five decades, is to have relevance, a permanent International Penal Court, which can justly and surely implement it, is indispensable.

B. Arguments against an International Penal Court

Some governments have expressed opposition to the development of an International Penal Court. The following is a list of the most common arguments against the Court, and our responses to them.

First, some governments believe that international agreement on a court, other than on an *ad hoc* basis, is unlikely. Technical and political disagreements will prevent the implementation of international jurisdiction.

While the creation of the Court is a technical task, it is not more complex than was the creation of similar bodies already established, including, the International Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights. Moreover, the International Law Commission has completed a detailed assessment of the technical possibility of creating a Court, and has concluded

that such a Court is possible. While we do not agree with all of the findings of the ILC Working Group, we do agree that the Court would be a "workable system".[17] So far, it has been the lack of political will, not the myriad technical issues, that has stood in the way.

The catastrophe in the former Yugoslavia, however, has prompted political will, dormant since Nuremberg, into action. The *ad hoc* tribunal is the result. Furthermore, the changing political climate presents the possibility for States to work together in a more systematic and comprehensive way. Establishing an International Penal Court is one example of cooperation based on reciprocity, mutual understanding, and reliance.

Second, and more importantly, the idea of the Court has been seen as an infringement of national sovereignty. National courts, according to this view, have exclusive jurisdiction over crimes committed in the territory of a State.

This argument ignores a number of basic points. It is well accepted under international law that "individuals have international duties which transcend the national obligations of obedience imposed by the individual state."[18] Gross violations of human rights, such as genocide and torture, by their very nature, fall under international jurisdiction. They constitute an attack on the very conscience of humanity. They negate the principles and objectives of the United Nations Charter. Many times, they constitute a threat to international peace and security. These matters transcend the claim of national sovereignty.

Moreover, States have already forfeited exclusive jurisdiction over these types of crimes by ratifying or adhering to the treaties that prohibit them. The supremacy of international law over domestic law is a customary

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[17] Id. at para. 401(iii)(b).

[18] Trial of the Major War Criminals Before the International Military Tribunal -- Nuremberg: 14 November 1945 - 1 October 1946, at 168-69 (1947); see also Nanette Dumas, Note, *Enforcement of Human Rights Standards: An International Human Rights Court and Other Proposals*, 13 Hastings Int'l & Comp. L. Rev. 585, 593 (1990).

international law principle. Article 14 of the Declaration on the Rights and Duties of States provides that "[e]very State has the duty in its relations with other States to comply with international law and with the principle which holds that the sovereignty of each State is subject to the supremacy of international law." Furthermore, Article 27 of the 1969 Vienna Convention on the Law of Treaties states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

Of course, the national courts are encouraged to try crimes, but they must do so effectively. Impunity rewarded for human rights violations precisely illustrates the failure of national courts. If national courts were always effective, the world would look a lot different than it does. National judicial sovereignty far from excludes the creation of an International Penal Court, it demands it. This point draws overwhelming support from the 1992 Report of the ILC Working Group:

> "The problem is such that courts, and the system of national jurisdiction generally, seem ineffective to deal with an important class of international crime, especially State-sponsored crime or crime which represents a fundamental challenge to the integrity of State structures. Reinforcing national criminal justice systems is not likely to address this need."[19]

III. A BLUEPRINT FOR THE INTERNATIONAL PENAL COURT

The primary purpose of the International Penal Court is to adjudicate the criminal responsibility of individuals charged with crimes under international law, primarily with respect to war crimes, crimes against peace and humanity, and systematic or mass violations of human rights.

The following is a brief and accessible blueprint of the permanent International Penal Court.[20] We claim neither to

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[19]Report of the ILC Working Group, supra note 12, at para. 431.

[20]Our proposals are provided in the context of the work already done by the ILC Working Group. To an extent, we follow the Working Group's order of issues and accept some of its findings. While we do

raise every issue nor to solve every problem. In some instances, we have simply listed possible alternatives to questions that will be answered during the establishment process.

A. Structure and Jurisdiction

1. Creation of the Court

The ILC Working Group has determined that:

> "Other methods of the establishment of an international criminal court have sometimes been proposed (e.g. through a resolution of the General Assembly or the Security Council). But the normal method for the creation of an institution is by a treaty agreed to by States parties. Where that institution is to be part of the United Nations additional steps may have to be taken, but initially the necessary structure needs to be agreed on by States. ... an international criminal court should have its own Statute in treaty form."[21]

The ICJ believes that the International Penal Court could be created either by a multilateral treaty among states or by an amendment to the United Nations Charter. While it is preferable that the Court be a permanent independent organ of the United Nations, the complex process of amending the U.N. Charter may prove more burdensome than the creation of a treaty. In any case, the International Penal Court should seek a formal relationship agreement with the United Nations.

2. The judiciary

Most importantly, the composition of the Court must be above suspicion of bias. Its members should fairly represent all the regions of the world. They should not be functionaries of their governments but should be independent jurists of the highest moral and legal standing. The independence and the impartiality of the judges have to be guaranteed by and enshrined in the Statute of the Court. It

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not fully endorse the report, we recognize its value as a thorough and concrete development. Many views expressed here, however, significantly differ from those of the Working Group.

[21] Report of the ILC Working Group, supra note 12, at para. 437.

must be a duty for all governments to respect and observe that independence. An independent and impartial judiciary is an indispensable requisite in any free society under the Rule of Law, including, of course, international society. In keeping with the 1985 U.N. Basic Principles of the Independence of the Judiciary, the judiciary of the International Penal Court shall:

> "decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter for any reason."[22]

Judges must be more than impartial, they must be highly qualified both in matters of criminal justice and international law. Furthermore, any method of judicial selection shall safeguard against judicial appointments for improper motives, and there shall be no discrimination on the basis of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status.[23]

The ILC Working Group concluded that the judiciary of the Court will be part-time body; judges would be selected each time the Court was called for. In our opinion, this is coming dangerously close to an *ad hoc* approach to international criminal jurisdiction. To ensure the development of a cohesive, independent, and committed judiciary, the Court should be a full-time body from its inception. In fact, a full-time judiciary is most necessary during the first days of the Court's existence to develop a collective understanding of the Court's procedures and to establish the precedent of consistent jurisprudence.

3. Jurisdiction

When a crime under international law is committed, there is always at least one State concerned: the State in whose territory the crime was committed, or the State to

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[22] art. 2.

[23] See U.N. Basic Principles of the Independence of the Judiciary, art. 10.

which the crime was directed.[24] In the best case scenario, a State would confer compulsory jurisdiction to the Court by simply becoming a party to its Statute. While it may seem logical that the acceptance of the Court's Statute is understood as an obligation to confer jurisdiction, the example of the International Court of Justice, in which a State must make a specific declaration to confer jurisdiction, gives reason to doubt the practicality of this approach.

Although the principle of national sovereignty is no longer absolute, States remain reluctant to confer international jurisdiction. The ILC Working Group suggested that this problem be solved in the following way:

> "Each State party to the Statute would be free to accept the court's jurisdiction. This could be done either *ad hoc* in relation to a particular offence alleged to have been committed by specified persons, or in advance for a specified category of offences against one or more of the treaties which fall within the subject-matter jurisdiction of the court, to the extent that the treaty is in force for the State concerned."[25]

This approach would give the Court solely concurrent jurisdiction; a State having jurisdiction under any of the internationally-recognised theories of jurisdiction, including territoriality and nationality, would be able to exercise that jurisdiction, but could, if it choses, confer jurisdiction to the International Penal Court. This approach might not be sufficient, however.

In our opinion, the question of jurisdiction needs to be further examined when the treaty establishing the Court is drafted. It has been suggested, and we agree, that the International Penal Court should be vested with exclusive jurisdiction over crimes such as genocide, systematic or mass violations of human rights, and apartheid.[26] While we recognize that political reality makes exclusive

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[24] The ICJ does not consider a State to have jurisdiction because its national is the victim or the perpetrator.

[25] Report of the ILC Working Group, supra note 12, at para. 446.

[26] See Special Rapporteur on the draft Code of Crimes Against the Peace and Security of Mankind, supra note 11, at para. 47.

jurisdiction unlikely, some type of exclusive jurisdiction is necessary for the International Penal Court to fulfil its promise. One possibility is that the Court have exclusive jurisdiction over some crimes, and concurrent jurisdiction over others.

In any case, the Court must be empowered to judge on legal and factual issues. Mere review jurisdiction over legal questions is not sufficient. On this question, the ILC Working Group found that:

> "the case for an international criminal court is essentially a case for a trial court, rather than an appellate or review body. Controversies surrounding allegations of serious international crimes are likely to be controversies about the facts -- especially if the offences have already been carefully defined by international treaties in force. In criminal cases, facts are essentially found at trial rather than on appeal or review -- especially if such appeal or review is to occur after national procedures have been exhausted -- i.e., at third or fourth remove from the trial itself."[27]

a. Sources of law and subject-matter jurisdiction

The Court must have a subject-matter jurisdiction which includes crimes under international law. These crimes include offences very different from each other. Apartheid and genocide are crimes under international law even if they are committed within the borders of a single State. International terrorism and drug trafficking, however, are international crimes precisely because they take place across national borders. Other actions, like State aggression, are crimes because they threaten international peace and security.

In addition to the treaty establishing the Court, the Court's primary sources of law are treaties defining some offences as crimes under international law. Over the last five decades of standard setting, the international community has created a body of law which provides the outline of the Court's subject-matter jurisdiction.

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[27] ILC Working Group, supra note 12, at para. 424.

Customary international law also constitutes an important source of reference on this matter.

First and foremost, these sources should include the draft Code of Crimes against the Peace and Security of Mankind. The inter-relationship between the draft Code and the Court has been established by the work of the International Law Commission. The International Penal Court would ensure the most objective and uniform interpretation of the draft Code, the most complete codification of international criminal law. Crimes under the draft Code include, *inter alia*:

--genocide;
--apartheid;
--mass or systematic violations of human rights, including, e.g., murder, torture, forced transfer or deportation of populations, and persecution on social, political, racial, religious or cultural grounds;
--war crimes, including, e.g., acts of inhumanity, cruelty or barbarity directed against the life, dignity or mental integrity of persons, such as torture and wilful killing;
--other international crimes, including drug trafficking and international terrorism.

The subject-matter jurisdiction should not be limited to the draft Code. Other sources of international law which could be used independently or as reference for the draft Code, include, *inter alia*: Convention on the Prevention and Punishment of the Crime of Genocide; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; Convention Concerning the Abolition of Forced Labour; Geneva Conventions and Additional Protocols; International Convention on the Suppression and Punishment of the Crime of Apartheid; and, any other treaties, including those yet to be created, that define crimes under international law.

b. Personal jurisdiction

We tend to agree with the ILC finding that "[t]his is one of the most difficult technical issues to be faced, in part because the potential range of circumstances is so wide, in part because of the different bases for the assertion of personal jurisdiction in criminal matters under the different national legal systems."[28] Some national legal systems utilize territoriality as the basis for criminal jurisdiction, and correspondingly have few inhibitions about the extradition of their own nationals to a State where the offence was committed. Others, while relying also on territoriality, assert criminal jurisdiction over acts of their nationals wherever committed, and will not extradite them.[29]

The broadest possibility, for example, would be to build on the existing principle of universal jurisdiction. Provided that the International Penal Court is established in a way that does not give rise to questions about political neutrality, independence, objectivity and impartiality, a procedure similar to extradition is no doubt a realistic tool for bringing perpetrators to justice.[30] It must be considered desirable for the international community to bring perpetrators of war crimes, systematic or massive violations of human rights, and crimes against peace and humanity to justice before an impartial international court with fair trial procedures.

Further, it is important not to confine possible perpetrators of crimes to public officials or representatives only, but also to private individuals acting under the acquiescence, order, or tolerance of State authorities, liberation movements, or organised groups exercising *de facto* control over a particular territory.

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[28] Id. at para. 452.

[29] Id. Again, the ICJ does not accept personal jurisdiction based solely on nationality.

[30] Extradition is used to bring individuals before foreign courts. The International Penal Court, however, should not be considered as a foreign institution.

B. Procedure & Prosecution

1. Criminal justice

Criminal procedure has to be established by the Statute of the Court. In this regard, the primary consideration must be the guarantees of fair trial and due process. The principles of non-retroactivity of less favourable criminal laws and penal sanctions, the principles *Nullum crimen sine lege* and *Nulla poena sine lege*, must be upheld.[31] Other fair trial guarantees, such as presumption of innocence, speedy trial, and assistance of counsel, must also be provided for.

These provisions can be based on Article 14 of the International Covenant on Civil and Political Rights, which provides in part:

> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
> (c) To be tried without undue delay;
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (f) To have free assistance of an interpreter if he cannot understand or speak the language used in court;

[31] See International Covenant on Civil and Political Rights, art. 15.

(g) Not to be compelled to testify against himself or to confess guilt.[32]

2. System of prosecution

Of the many possible methods of bringing charges against an accused, the ICJ believes that the power to bring charges should be entrusted to an prosecutorial organ, strictly separate from the judiciary and judicial proceedings. An independent office of prosecutors is necessary because the preparation of charges should be accompanied by the complete guarantees of impartiality and objectivity.

The office of prosecutors would be responsible for the investigation, collection, and production of all necessary evidence. Given the importance of this responsibility, selection criteria for prosecutors must embody safeguards against appointments based on partiality or prejudice of any kind, and requirements for a high level of professional experience and expertise in criminal and international law.

In the performance of its duties, the office of prosecutors shall:

> --carry out its functions impartially and avoid all kinds of discrimination;
> --protect the public interest, act with objectivity, take account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or the disadvantage of the suspect;
> --keep matters in its possession confidential, unless performance of duty or needs of justice require otherwise;
> --consider the views and concerns of victims and ensure they are informed of their rights in accord with the Declaration of Basic Principles of Justice for Victims of Abuse of Power;
> --not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded;
> --refuse evidence it believes to have been obtained through unlawful methods, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, and shall take all necessary steps to ensure that those responsible are brought to justice.[33]

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[32] Id. at art. 14.

[33] See U.N. Guidelines on the Role of Prosecutors.

The office of prosecutors should accept complaints from a broad variety of sources. States would be able to submit complaints. The same right should be granted to individuals, in particular to victims, as is the case, for example, under the Optional Protocol to the International Covenant on Civil and Political Rights. It must be emphasized that the International Penal Court is a judicial, and not political, organ, and that the office of prosecutors should concern itself only with prosecuting those responsible for crimes under the Court's jurisdiction.

One way of enhancing the authority of the Special Rapporteurs and Working Groups established by the Commission of Human Rights would be to grant them the right to bring complaints before the Court. Given this power, they could more effectively fulfil their tasks, and be more likely to receive the full cooperation of States in their investigations.

3. Bringing defendants before the Court

As mentioned briefly above in the discussion of personal jurisdiction, the question of how to bring defendants before the Court could present a formidable obstacle. In his tenth report, the Special Rapporteur on the draft Code recommended that the Statute of the Court should provide that transfer to the Court was not to be regarded as extradition. The International Penal Court is not to be equated to a foreign court, but to a court of the transferring State. This direct approach avoids the complications presented by extradition.[34]

This approach, however, could also present conflicts with domestic constitutions. It is necessary, therefore, that the treaty establishing the Court includes the minimum requirements for the transfer of accused persons. State parties to the treaty would be bound by this transfer agreement.

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[34] Special Rapporteur on the draft Code of Crimes Against the Peace and Security of Mankind, supra note 11, at paras. 76-83.

4. Penalties & implementation of sentences

Another issue to be addressed is the question of punishment. The sources that define crimes under international law, such as those listed above, are silent on this issue. Even the Genocide Convention, which visualises an international genocide court, goes no further than to refer to "effective penalties" for persons guilty of genocide.[35] It is suggested, both by the ILC Working Group and the ICJ, that the treaty establishing the Court deal with the question of penalties.

Regarding the enforcement of execution of sentences the Court might either depend on the cooperation of States, who will carry out the sentences in their own detention facilities, or the Court might have its own facilities. In any event, prison conditions would be consistently monitored by the Court, in particular to ensure that the United Nations Minimum Standard Rules for the Treatment of Prisoners were followed.

5. Right to Appeal

The right to appeal a decision of the International Penal Court must also be guaranteed. We emphasize the importance of Article 14 (5) of the International Covenant on Civil and Political Rights: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

It is conceivable that the permanent International Penal Court be composed of two level of jurisdictions, one of first instance and another of appeal. It is also possible that the International Court of Justice be entrusted with review competence over questions of law decided by the International Penal Court.

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[35] art. V.

IV. RECOMMENDATIONS & CONCLUSIONS

The ICJ proposes the establishment of an independent and permanent International Penal Court to prosecute those responsible for crimes under international law. The International Penal Court should:

1. be a full-time, permanent, impartial, and independent body associated with the United Nations;

2. be composed of highly-qualified independent and impartial jurists representing all regions of the world;

3. have subject-matter jurisdiction over all crimes under international law, including, those listed in the draft Code of Crimes Against the Peace and Security of Mankind, including;

   --genocide;
   --apartheid;
   --mass or systematic violations of human rights, including, e.g., murder, torture, forced transfer or deportation of populations, and persecution on social, political, racial, religious or cultural grounds;
   --war crimes, including, e.g., acts of inhumanity, cruelty or barbarity directed against the life, dignity or mental integrity of persons, such as torture and wilful killing;
   --other international crimes, including drug trafficking and international terrorism.

4. ensure all due process and fair trial guarantees, such as those provided for in Article 14 of the International Covenant on Civil and Political Rights;

5. contain an independent and full-time prosecutorial organ to bring charges against accused persons and to collect, prepare, and present necessary evidence;

6. accept complaints from a broad variety of sources, including States and individuals.

This is not the first time the ICJ has urged for the creation of an international judicial mechanism. In 1968, the year of the first World Conference on Human Rights held in Tehran, then-Secretary-General Seán MacBride wrote:

> "The great defect of the present efforts of the United Nations to provide implementation machinery is that it is piecemeal, disjointed and is political rather than judicial. Effective implementation machinery should confirm to judicial norms, it should be objective and automatic in its operation; it should not be *ad hoc* nor dependent on the political expediency of the moment. Has the time not come to envisage the establishment of a Universal Court of Human Rights analogous to the European Court of Human Rights with jurisdiction to pronounce on violations of human rights? Even if its judgments were initially to be only declaratory, they would be of considerable moral value and would help to create judicial norms in the field of human rights. Its findings would certainly carry far more weight than those of transient and often ill-equipped part-time U.N. Committees or Sub-Committees, selected on a political basis.
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> ... Such a permanent judicial tribunal would not suffer from the inherent defect of being set up on an *ad hoc* basis to deal *ex post facto* with a particular situation. The decisions of such a tribunal might remain temporarily unenforceable in some regions. But behind every act of cruelty there is an individual who perpetrates or inspires the act of cruelty. That individual could at least be identified and branded as an outlaw. Such a sanction would have a restraining influence and would reduce the trend towards the brutalization of mankind.
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> In protecting human rights, it is not sufficient to enunciate the rights involved; it is essential to provide a judicial remedy accessible to those affected. In curbing cruelty and crimes against humanity it is not sufficient to deplore them; it is essential to pass judgment and if necessary outlaw the individuals responsible."[36]

Twenty-five years later, we can conclude no better than to repeat these words. Our hope is that this time, in 1993, they will be heeded.

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[36]Seán MacBride, *Introduction*, 8 Journal of the I.C.J. iii, iv-vi (1968).